No. 56379-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

YANIV LIVNAT,
Respondent,

v.

STATE OF WASHINGTON,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF RESPONDENT

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A. INTRODUCTION.

Shay Livnat was suspended from school and then he ignored and cursed at his father when discussing this suspension. Shay claimed his father assaulted him during an ensuing argument while Mr. Livnat explained his behavior was reasonable parental discipline. During Mr. Livnat's trial, Shay's mother alleged Mr. Livnat also attacked her in the past and he had improperly "handled" her son on other occasions. She gave this testimony despite a clearly communicated court ruling prohibiting evidence of these uncharged accusations.

After discussing the harmful effect of this witness's testimony and weighing its prejudicial effect on Mr. Livnat's right to a fair trial, the court dismissed the case under CrR 8.3(b). Because the court properly exercised its discretionary authority based on its assessment of the case and the impact of the errors, the court's order should be affirmed.

B. ISSUES PRESENTED.

1. Did the court validly exercise its discretion when it ruled that a witness's intentional violations of court rulings and injection of unduly prejudicial, uncharged allegations against Mr. Livnat caused actual prejudice to the fairness of the trial and warranted dismissal of the case under CrR 8.3(b)?

2. The prosecution now claims the court lacked authority to issue its preliminary ruling striking the witness's testimony due to her violations of the court's rulings and inappropriate behavior. In the trial court, the prosecution agreed that striking this testimony was appropriate. Did the court validly exercise its discretion and is this nonconstitutional issue unpreserved on appeal when the prosecution agreed to the ruling?

3. Principles of double jeopardy bar retrial after a mistrial if the mistrial was not appropriately ordered and the defense did not consent to it. Here, the prosecution contends there was no valid basis for the court stop the trial from

proceeding to conclusion. Where Mr. Livnat expressly objected to a mistrial and believed a mistrial was more harmful than continuing with the trial, does double jeopardy bar retrial?

4. If this case is remanded for further proceedings, should this Court deny the State's request for a new judge where the trial judge did not learn information it was not entitled to hear or make decisions that preclude the judge from fairly presiding?

C. STATEMENT OF THE CASE.[1]

In February 2020, Yaniv Livnat's 12-year-old son Shay was suspended from school for one week. 5RP 17.[2] Shay's

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[1] The prosecution's Statement of the Case relies on the allegations in the probable cause certification rather than the trial testimony on the grounds that the case was dismissed before verdict. App. Brief at 7 n.1. However, the prosecution had presented most of its case. Mr. Livnat cites the trial testimony to reflect the evidence before the court.

[2] Mr. Livnat adopts the citation format used by the prosecution for 1RP through 4RP. Because the prosecution provided only part of the trial, the rest of the trial proceedings are contained in two volumes cited as 5RP and 6RP.
1RP Oct. 19, 2021 (pretrial hearing)
2RP Oct. 25, 2021 (Ms. Fernandez's testimony)

mother Shalaine Fernandez described Shay as being "very rebellious, verbally abusive" and "very disrespectful" at this time. 2RP 9. A few weeks earlier, Ms. Fernandez had discussed sending Shay to live with his father when Shay "really acted out" and she was "at [her] wit's end." 2RP 27-29.

Mr. Livnat arranged to meet with Shay's school principal, hoping to reduce the suspension. 2RP 38; 5RP 105. Mr. Livnat went to the home where Shay lived with his mother and then-stepfather Oz Chai to discuss the suspension with Shay before meeting the principal. 5RP 105. Ms. Fernandez was not at home but she knew Mr. Livnat was planning to speak to Shay. 2RP 38-40.

Mr. Livnat knocked on the door and Mr. Chai let him in then went to his bedroom, leaving the father and son to talk. 6RP 98-99. Ms. Fernandez said Mr. Livnat was "welcome" at

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3RP Oct. 26, 2021 (discussion of dismissal)
4RP Oct. 27, 2021 (order and findings of dismissal)
5RP Oct. 25, 2021 (opening statements and trial testimony)
6RP Oct. 26, 2021 (further trial testimony).

her house but she had asked him not to come and discipline Shay. 2RP 24. Shay said Mr. Livnat disciplined him by taking his "things" or privileges. 2RP 25; 5RP 57, 108.

Shay was not interested in speaking to his father about the suspension. 5RP 28. He ignored his father and refused to communicate, then walked out of the room. 5RP 28-29. Shay later admitted he was being "a prick" to his father. 5RP 108-09. Shay later posted a TikTok video expressing his pleasure in getting a long suspension from school. Ex. 101; 5RP 97-101.

To discipline Shay, Mr. Livnat began removing the computer Shay used to play video games. 5RP 30, 32, 72. Shay cursed at his father and ran upstairs to the bedroom where Mr. Chai was. 5RP 109-12. Shay curled into a ball on the bed and claimed Mr. Livnat hit him on the back of the head and briefly pushed his hands against Shay's throat, limiting his ability to breathe for one, two, or three seconds. 5RP 37, 43. Shay kicked Mr. Livnat in the chest. 5RP 43-45. Mr. Livnat and Shay screamed and yelled at each other. 5RP 37, 48-49. Shay said

Mr. Livnat also may have slapped or hit him on the head after he got off the bed. 5RP 50.

Mr. Chai and Mr. Livnat left Shay in the bedroom and Shay locked the door and called 911, telling the operator his father had been hitting him. 5RP 57. Mr. Livnat forced his way back into the bedroom and told the 911 operator everything was fine. 5RP 59. Mr. Livnat left the house. 5RP 59-60.

Mr. Chai was in the room when this assault allegedly occurred. 6RP 102-03. He believed Mr. Livnat put his hand on Shay's chest and did not believe he tried to choke Shay, but his memory was not clear. 6RP 103-04. He did not see Mr. Livnat hit Shay with more than an open hand. 6RP 113.

Ms. Ferguson arrived at the house after the incident was over and Mr. Livnat was outside of the home. 2RP 13. Mr. Livnat appeared very angry. 2RP 14.

The prosecution charged Mr. Livnat with assault of a child in the second degree and assault in the fourth degree, residential burglary, malicious mischief in the third degree, and

interfering with the reporting of domestic violence. CP 6-9. Mr. Livnat advised the court that his defense rested on reasonable parental discipline and also involved self-defense. 1RP 21-29.

Mr. Livnat moved to preclude any evidence of uncharged wrongful acts. 1RP 17. The prosecution agreed not to offer any uncharged acts and the court granted the motion. 1RP 17-18.

The prosecutor said he spent 35 minutes with Ms. Fernandez before the trial and he focused on instructing her not to address anything outside of this case, "very specifically" telling her not to talk about a prior assault she alleged against Mr. Livnat about 10 years earlier. 2RP 43.

At trial, when the prosecutor asked Ms. Ferguson to describe what she saw when she arrived home, she told the jury she had not seen Mr. Livnat so angry since "he attacked me" and it was "like PTSD" for her. 2RP 16-17. She also told the jury that Mr. Livnat had acted inappropriately with Shay a few weeks earlier and she did not like how he "handled" Shay on those other occasions. 2RP 24, 25, 40.

Defense counsel repeatedly objected when Ms. Ferguson mentioned uncharged claims of misconduct by Mr. Livnat contrary to the court's pretrial rulings. 2RP 16, 29, 36-37, 40. The court sustained the objections and directed the witness to answer only the questions before her. 2RP 16, 29, 37, 44. When Ms. Ferguson continued to disregard the court's evidentiary rulings when answering questions, Mr. Livnat argued it was impossible for him to receive a fair trial. 2RP 40-41.

The court agreed that Ms. Ferguson was intentionally disregarding the court's evidentiary rulings and inserted unduly prejudicial evidence into the case. CP 23-24. The court ruled the jurors would not be able to put out of their minds the image of defense counsel yelling at Ms. Ferguson to get her to stop talking while he was objecting to her testimony yet she continued to speak. 4RP 25.

Initially, the court ruled it would strike Ms. Ferguson's testimony due to her violation of its rulings but it did not know if that was enough and asked whether it should grant a mistrial.

3RP 49. However, Mr. Livnat did not want a mistrial because further delay and holding second trial was also unacceptably prejudicial, particularly because he had been unable to speak to his son due to a separate family court matter that was stayed pending this case. 3RP 48-49; 3RP 4, 15-16.

After further argument, the court agreed the circumstances of this case met the criteria for dismissal under CrR 8.3(b). 3RP 25; 4RP 3-4. It ruled that given Ms. Ferguson's in-court behavior, striking her testimony would not cure the error, and her repeated, intentional violations of the court's rulings unacceptably prejudiced the fairness of the trial. CP 23-24.

D. ARGUMENT.

1. The court properly exercised its discretion, evaluated the error in the context of the case, determined there was actual prejudice to Mr. Livnat's right to a fair trial, and dismissed the case.

a. A court may dismiss a case when arbitrary action or governmental misconduct causes actual prejudice to a fair trial.

An accused person's right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. CrR 8.3(b) protects an accused person from "a violation of the right to a fair trial, a right guaranteed by the Fourteenth Amendment's due process clause." *State v. Solomon*, 3 Wn. App. 2d 895, 908-09, 419 P.3d 436 (2018).

The right to a fair trial encompasses a host of bedrock protections. It includes effective assistance of counsel as well as a speedy trial. *State v. Brooks*, 149 Wn. App. 373, 387, 203

P.3d 397 (2009). It prohibits unfairly prejudicial evidence. *State v. French*, 157 Wn.2d 593, 605, 141 P.3d 54 (2006). "[T]he right to a fair trial includes the exclusion of perjured testimony." *State v. Statler*, 160 Wn. App. 622, 641, 248 P.3d 165 (2011). The presumption of innocence is a "basic component of a fair trial." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

The prosecution cannot force a person choose between their bedrock rights. *Brooks*, 149 Wn. App. at 387.

CrR 8.3(b) authorizes courts to dismiss a case when arbitrary action or governmental misconduct causes actual prejudice to the accused person's right to a fair trial. CrR 8.3(b).[3] Dismissal is justified when there is a preponderance of

[3] CrR 8.3(b) provides:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

evidence showing misconduct caused actual prejudice. CrR 8.3(b) rule does not require any evidence of nefarious intent or purposeful misconduct by the government. *State v. Micheilli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

b. This Court defers to the trial court's assessment of the facts and reviews a ruling under CrR 8.3 for a manifest abuse of discretion.

When a court dismisses a case under CrR 8.3(b), its exercise of "power is discretionary and is reviewable for manifest abuse." *State v. Stephans*, 47 Wn. App. 600, 603, 736 P.2d 302 (1987). For the court's decision to constitute a manifest abuse of discretion, this Court must find "no reasonable person would take" the view adopted by the court. *State v. Martinez*, 121 Wn. App. 21, 30, 86 P.3d 1210 (2004) (quoting *State v. Lewis*, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990)).

This Court defers "to the trial court's superior position as the trier of fact." *Martinez*, 121 Wn. App. at 30. "[C]redibility determinations are solely for the trier of fact" and "cannot be

reviewed on appeal." *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

The trial court's superior position to resolve credibility issues and factual disputes stems from its in-court observations, including a witness's tone and body language. *State v. Boyer*, 200 Wn. App. 7, 13, 401 P.3d 396 (2017). Even when people could assess evidence differently, this Court will not disturb the trial court's factual findings as long as they are supported by the record. *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674 (1974).

The prosecution ignores this basic premise in its brief. Instead, it contends that the defense "loses" when "evidence is in equipoise." App. Brief at 43. It repeatedly asks this Court to construe the trial court record differently from how the trial judge assessed it. But an appellate court must defer to a trial court's discretionary assessments of how a witness's testimony and in-court behavior affected the jurors and impacted the court

proceedings. *Martinez*, 121 Wn. App. at 30; see *Morse*, 149 Wn.2d at 574.

Here, the prosecution admits one "clear violation" of the court's pretrial rulings. It does not prove this violation was harmless beyond a reasonable doubt and asks this Court to disregard the trial court's findings of further violations. *See State v. Sherman*, 59 Wn. App. 763, 768, 801 P.2d 274 (1990) (prosecution appealing dismissal under CrR 8.3 must prove "beyond a reasonable doubt that the violation did not prejudice" the defendant). The trial court's factual determinations are amply supported by the record and fairly assess the impact of Ms. Fernandez's behavior on the outcome of the trial.

i. The court's findings of fact are supported by the record.

The prosecution's brief assigns error to a number of the court's findings of fact. But its complaints are either baseless,

picayune, or ignore the deference this Court must use when reviewing the trier of fact's assessment of the evidence.

The prosecution disputes Finding of Fact 6, which states, "Ms. Fernandez responded by indicating she did not recall because she was suffering from PTSD." CP 23. This finding accurately reflects and summarizes Ms. Fernandez's testimony.

The prosecution asked Ms. Fernandez, "did you actually call the police at that time?" referring to whether she called the police when she arrived home after the incident between Shay and Mr. Livnat. 2RP 17. Ms. Fernandez answered,

> That's kind of foggy because I don't know if I grabbed the phone. I was terrified because this is traumatic for me, and, like, PTSD for me. So I was shaking already, not knowing what happened. I don't know if I called the police or I told my friend "Call the police." I just couldn't think straight so I may have had somebody else call for me.

Id. Before giving this answer, Ms. Fernandez said she had not seen Mr. Livnat this angry since "he attacked me" -- testimony referring to a prior assault the court had expressly forbidden. 2RP 16; CP 22-23.

The judge heard Ms. Fernandez's testimony in the context in which it was given, understood the pauses and emphases she placed on her words, and summarized her testimony in this finding of fact. *See Boyer*, 200 Wn. App. at 13. The record shows Ms. Fernandez indeed said she did not recall whether she called the police due to her PTSD. Substantial evidence supports in Finding of Fact 6.

The prosecution assigns error to Finding of Fact 8, which says Ms. Fernandez was testifying without a question presented and "[c]ounsel for the defendant had to raise his voice, yelling 'stop,' to interrupt Ms. Fernandez to prevent her from continuing to violate the Court's orders with respect to the objections and ruling on motions in limine." CP 23. This finding also accurately reflects the trial proceedings.

Defense counsel asked Ms. Fernandez if she knew Mr. Livnat "was going to go talk to Shay and get Shay's version" of the school suspension. 2RP 39. Ms. Fernandez did not answer with a yes or no, and instead said,

> I didn't know when he was coming. I said if you want to speak to Shay - - because, at that time, Shay wasn't speaking to him [Mr. Livnat] at all for, like two weeks because of how he handled him. So --.

2RP 40. Defense counsel objected and began asking the court to be heard "outside the jury - - outside -." 2RP 40. But while defense counsel was speaking, Ms. Fernandez continued to talk about Mr. Livnat. 2RP 40. In an effort to keep Ms. Fernandez from making additional prejudicial comments about something Mr. Livnat did two weeks earlier, defense counsel yelled, "Stop talking," and asked the judge to have a discussion outside the jury's presence. 2RP 40.

The court found defense counsel had to yell to get Ms. Fernandez to stop speaking. CP 23. The court explained, "Her conduct was such that yes, an attorney had to basically yell stop. I can't erase that from any juror's mind." 3RP 25. Defense counsel similarly described his behavior as having "to essentially yell at her in front of the jury to get her to stop talking." 3RP 24. The trial prosecutor did not dispute this

description of events. The prosecutor did not object to Finding of Fact 8, although he objected to other findings. *See, e.g.*, 4RP 5 (objecting to Finding of Fact 15). It is supported by substantial evidence.

Similarly, Finding of Fact 7 accurately reflects the numerous instances of Ms. Fernandez's non-responsive answers. The prosecution does not assign error to this finding even though it criticizes the finding in its brief. App. Brief at 38. The record shows the prosecutor, defense attorney, and the court complained to the witness that she was not answering the questions put to her and instead introducing other information. 2RP 24, 29, 35, 36, 37, 39-40. The court heard the questions and answers and its ruling that the witness gave non-responsive answers is amply supported by substantial evidence. *See* 2RP 24, 29, 35-37, 39-40.

The prosecution also assigns error to findings of fact 10, 13, and 15, which find Ms. Fernandez blatantly and intentionally violated the court's rulings. CP 23-24. These

findings are supported by substantial evidence. In advance of trial, defense counsel told the prosecution about his concern, based on the pretrial interviews, that Ms. Fernandez "wanted to interject her personal animus towards" Mr. Livnat into the case. 2RP 48. The prosecutor said he took pains to impress upon Ms. Fernandez the permissible limits of her testimony "multiple times" and told her not to discuss any events outside the charged incident. 2RP 43; 3RP 19. Yet Ms. Fernandez did not follow this instruction.

The court resolves questions of credibility and the issue of intent largely rests on the evaluation of credibility. *State v. Hicks*, 163 Wn.2d 477, 493, 181 P.3d 831 (2008). The court's credibility assessment of Ms. Fernandez's intentional and blatant violation of the court's rulings is squarely within the trial court's province. It is supported by evidence that the witness had the rulings clearly explained to her yet she injected the uncharged misconduct into the case despite being told not to do so.

The court's findings reflect what happened on the record and what the court observed. The trial court is in the best position to assess the witness's understanding of the rules and purposeful violation of them. "Deference must be given to the trier of fact" and there is no basis to disturb the court's evaluation of the testimony. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The prosecution further asserts that the court could not find the witness acted intentionally when it rejected the prosecution's request to hold a hearing on Ms. Fernandez's intent. App. Brief at 42. But this claim misrepresents the record. The trial prosecutor agreed the court could decide whether Ms. Fernandez was intentionally violating the court's rulings without further fact-finding hearings. 3RP 19, 22.

The trial prosecutor merely offered to arrange a hearing if the court wanted one. He said, "[i]f the Court finds it necessary," to question Ms. Fernandez "under oath, I certainly can do my best to facilitate that." 3RP 22. The prosecutor said,

"again, I will leave that determination of the intentionalness [sic] up to the Court." 3RP 19.

The prosecutor never claimed the court needed to question Ms. Fernandez. On the contrary, he appropriately recognized, "obviously, the Court's observed everything that's happened here, so I do think the Court can probably make a record based on that." 3RP 22. It only suggested bringing Ms. Fernandez back for further questioning if the Court "found that necessary." 3RP 22.

As the record shows, the prosecution conceded there was no reason for the court to question the witness further and the court's own observations sufficed. Based on the court's observations, it reached reasonable conclusions about the witness's testimony and her intentional violation of court rulings. This Court does not revisit these factual assessments on appeal.

ii. The court reasonably and accurately concluded the witness violated the court's rulings and the rules of evidence on multiple occasions.

On appeal, the prosecution insists Ms. Fernandez violated the court's pretrial rulings once, when she said Mr. Livnat "attacked" her in the past. App. Brief at 36. Yet her testimony about Mr. Livnat's prior "attack" on her was not the only time Ms. Fernandez injected wrongful conduct into the case in violation of the court's rulings.

Ms. Fernandez also violated the court's ruling and referred to bad acts by Mr. Livnat when she said she could not remember what happened after she saw Mr. Livnat's anger because this anger was so "traumatic" to her that it caused her "PTSD." 2RP 17. She made this comment right after saying Mr. Livnat attacked her before and she was "terrified at how angry [Mr. Livnat] was" on this day because "I just know him." 2RP 16. This testimony unmistakably indicated Mr. Livnat committed other bad acts, had a propensity for anger and

aggression, and his behavior traumatized Ms. Fernandez. 2RP 16.

The court accurately found this testimony violated its ruling barring testimony of uncharged bad acts. CP 23. On appeal, the prosecution reads the remark in isolation, but the parties and judge understood the prejudicial effect of this testimony and the connection between PTSD and the prior attack. *See* App. Brief at 37.

As defense counsel explained, Ms. Fernandez told the jury "she's been attacked by" Mr. Livnat, she suffers from PTSD, and "she had a flare up of PTSD because of the attack" on Shay. 3RP 23. She said "she couldn't even remember what was happening because of the PTSD from being attacked by Mr. Livnat." 2RP 47-48. The defense could not "unring the bell that she was attacked and so she went through PTSD." 3RP 41.

The court agreed that when Ms. Fernandez said "he attacked me," and she "follow[]ed it up with [her] PTSD," this second comment cemented the prejudice from claiming she had

been attacked by Mr. Livnat in the past. 2RP 49. Contrary to the prosecution's alternative explanation offered for the first time on appeal, the parties understood Ms. Fernandez's assertion that this incident was so traumatic that it triggered her PTSD was directly connected to her preceding testimony that she had not seen Mr. Livnat this angry since he attacked her. There was no dispute that these comments violated the court's ruling barring any uncharged bad acts. 1RP 17-18.

On appeal, the prosecution asks this Court to disregard the prejudicial effect of Ms. Fernandez's asserted PTSD by assuming the jury did not know what PTSD is. App. Brief at 37. But as defense counsel said, "We all know that PTSD is a result of a triggering event that occurs later that causes you to react to that." 3RP 23. By referring to her PTSD, "exactly what" Ms. Fernandez was saying was that this event triggered a traumatic memory of the time Mr. Livnat "attacked" her. *Id*.

Notably, the trial prosecutor did not disagree with defense counsel and the court's assessment that Ms. Fernandez

magnified the prejudicial effect of testifying about being "attacked" by Mr. Livnat when she "follow[ed] it up with PTSD." 2RP 49. The jury does not need to be informed of the diagnostic criteria for PTSD to be prejudiced by hearing this testimony. The court reasonably and accurately treated Ms. Fernandez's other comments that directly or indirectly informed the jury of other bad acts by Mr. Livnat violated the motion in limine rulings.

Ms. Fernandez also violated the court's ruling prohibiting evidence of other bad acts when she testified that Mr. Livnat had behaved inappropriately toward her son in the past.

Before trial, the prosecution agreed there would be no evidence of prior bad acts by Mr. Livnat. 1RP 17. It told the court it would not elicit any background explanations, such as why Ms. Fernandez said she did not want Mr. Livnat to come to her house. 1RP 17. At trial, the prosecution asked Ms. Fernandez to explain what she told Mr. Livnat about his

permission to come to her house, but warned her to answer "[w]ithout" saying what led her to this decision. 2RP 24.

Yet Ms. Fernandez gave the very information the prosecution told her not to discuss, saying, "I did not like how he handled Shay the last time he was in the house. I had concerns about it." 2RP 24. She continued, saying Mr. Livnat's prior behavior "wasn't right. I don't think this is the proper way of handling [Shay]. And I don't want it in my house anymore." 2RP 25. This testimony told the jury Mr. Livnat engaged in wrongful conduct toward his son in the past and violated the court's ruling excluding uncharged bad acts. 1RP 18; CP 56-58.

Again, when asked whether she spoke to Mr. Livnat about his intent to talk to Shay about his school suspension, Ms. Fernandez disregarded the actual question and injected improper information into her answer, saying, "Shay wasn't speaking to [Mr. Livnat] at all for, like two weeks, because of how [Mr. Livnat] handled him." 2RP 40. Telling the jury Mr.

Livnat "handled" Shay improperly weeks earlier violated the court's pretrial ruling. CP 58; 1RP 18.

As these examples show, Ms. Fernandez repeatedly informed the jury that Mr. Livnat had behaved improperly towards her and her son on occasions other than the incident itself. Before trial, the court granted Mr. Livnat's motion to exclude any evidence Mr. Livnat "committed other crimes or alleged bad acts." CP 56-58; 1RP 17-18. The prosecution did not seek to admit any prior bad acts and it informed the court it would not offer evidence about allegations of misconduct that arose in the weeks before the incident. 1RP 17. The court granted the motion in limine with the understanding this information was excluded. 1RP 18. Ms. Fernandez repeatedly encouraged the jury to view Mr. Livnat as having a propensity to commit aggressive, assaultive acts despite the court's prohibition on this testimony.

c. CrR 8.3 applies to the arbitrary action and misconduct of a central prosecution witness whose behavior upends the fairness of the trial.

CrR 8.3 provides that arbitrary action and governmental misconduct are grounds for dismissal when prejudicial to the right to a fair trial. The behavior justifying dismissal depends on the facts of each case, but it includes actions by court administrators, police officers, and other people who play a role in a case. The arbitrary action or governmental misconduct does not have to stem from the prosecutor's own bad acts.

The prosecution's failure to rectify an arbitrary action or misconduct committed by others may result in the deprivation of the right to a fair trial. People accused of crimes "are among the people the prosecutor represents." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). The prosecution "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *Id*.

In its brief, the prosecution asserts that CrR 8.3(b) never applies to a witness's actions because it has no control over its

witnesses and no responsibility for their behavior. But governmental misconduct under CrR 8.3(b) does not have to be actions by a prosecutor. For example, mismanagement by court personnel presents a viable claim of governmental misconduct. *State v. Jieta*, 12 Wn. App. 2d 227, 232, 457 P.3d 1209, *rev. denied*, 195 Wn.2d 1026 (2020) (construing identical language in CrRLJ 8.3(b)).

This argument also fundamentally disregards the necessary role witnesses play in the government's prosecution of a case. The prosecution cannot provide a speedy trial if its witnesses fail to appear and it cannot fulfill its duty to see that the defendant received a fair trial when its witnesses refuse to adhere to rules of evidence or orders of the court. *See, e.g.*, *Brooks*, 149 Wn. App. at 391; *Price*, 94 Wn.2d at 814.

Here, the prosecution understood the court barred evidence of any "alleged bad acts" on occasions other than the incident itself. 1RP 17-18; CP 56-58. It agreed it would not elicit evidence about other allegations, including evidence Mr.

Livnat had assaulted Ms. Fernandez in the past or that he acted inappropriately toward Shay in the weeks before the incident, causing Ms. Fernandez to tell him not to come to their home. 1RP 17-18.

While the prosecutor said he clearly instructed Ms. Fernandez not to offer this information, she did so anyway. Consequently, either Ms. Fernandez arbitrarily refused to follow the court's rulings or the prosecution did not explain the rulings clearly enough. Either reason satisfies the arbitrary action or governmental misconduct prejudicing the fairness of the trial as contemplated by CrR 8.3(b).

The prosecution cites a litany of inapposite cases. It asserts the prosecution is never responsible for its witnesses' behavior, citing cases that involve the prosecution's pretrial obligation to arrange witness interviews. App. Brief at 45-46. These cases have no bearing on whether a witness's violations of court orders during trial violates CrR 8.3(b).

It also asks the Court to treat a CrR 8.3(b) dismissal ruling as if it required the same showing as when the prosecution purposefully provokes a mistrial so double jeopardy rules bar retrial. *See State v. Hopson*, 113 Wn.2d 273, 280, 778 P.2d 1014 (1989) (finding no double jeopardy bar to retrial when witness's testimony causes mistrial where court did not find witness acted intentionally). Unlike a case where the prosecution purposefully provokes a mistrial, CrR 8.3(b) does not require any nefarious behavior or bad faith by the prosecution. The legal threshold used to assess whether the State provoked a mistrial is not pertinent here.

CrR 8.3(b) also does not rest on whether the exclusionary rule applies to the actions of a confidential informant, as in another case the prosecution cites. App. Brief at 45; *see State v. Wolken*, 103 Wn.2d 823, 830 P.2d 319 (1985) (deferring to trial court's determination that informant had not lied to police in course of obtaining search warrant).

Similarly, whether a *Brady* violation occurred when a State's witness did not disclose information to the defense rests on a test different from CrR 8.3(b). *State v. Mullen*, 171 Wn.2d 881, 901, 259 P.3d 158 (2015). The prosecution tries to compare this case to *Mullen*, where an accountant who testified for the prosecution was also a witness in an unrelated civil deposition. *Id*. at 891. The defense claimed the prosecution violated its discovery obligations by failing to give the defense a copy of the accountant's civil deposition. *Id*. at 893. The Supreme Court disagreed, reasoning the defense knew about the civil case deposition and could have accessed it. *Id*. at 904. *Mullen* does not involve a prosecution witness's behavior at trial who refuses to follow court rulings and injects prohibited prejudicial information into the case.

Parties must effectively communicate the court's rulings to "their witnesses." *State v. Taylor*, 18 Wn. App. 2d 568, 581, 490 P.3d 263 (2021). ER 103(c) states that in jury trials, the court and parties must "prevent inadmissible evidence from

being suggested to the jury by any means," to the extent practicable.

For example, in *Taylor*, the prosecution did not sufficiently explain a court's pretrial rulings to an expert witness called to rebut the defense of diminished capacity. 18 Wn. App. 2d at 576. The witness violated the court's pretrial rulings three times: by saying she reviewed the defendant's criminal history, saying Mr. Taylor has a "lengthy history of --" when speaking of alcohol ingestion before being cut off, and saying the defendant asked for an attorney after his arrest. *Id*. at 575. The trial court sustained the defense's objections and struck each comment. *Id*. The trial court ruled the witness violated the motion in limine rulings but the violations were not sufficiently prejudicial for a mistrial. *Id*. at 576. But this Court held the prejudicial impact of the witness's violations of the court's pretrial rulings required reversal. *Id*. at 581-83.

The *Taylor* Court faulted the prosecution for not explaining the pretrial rulings clearly enough. *Id*. at 576, 581-

82. It ruled the witness was not purposefully injecting prejudicial information into the case. *Id*. at 581. It ordered a new trial because the repeated violations of the motion in limine rulings "impermissibly burdened" Mr. Taylor with "repeated objections, motions to strike and requests for curative instructions, substantially increasing the prejudice to him such that nothing short of a new trial can ensure that he is tried fairly." *Id*. at 584.

Taylor is instructive even though it does not involve a motion to dismiss under CrR 8.3(b). It shows that when a witness violates motion in limine rulings, this violation unfairly burdens the accused person's right to a fair trial. A witness's comments may deprive an accused person of a fair trial even when they are stricken from the record and only repeated a few times. In addition, litigators are responsible for their own witnesses and must communicate court rulings fully.

Here, the prosecutor said he expressly conveyed the court's pretrial rulings to its witness, unlike in *Taylor* where

the prosecution admitted he did not fully inform the witness of the court's rulings. Yet even though Ms. Fernandez knew the evidentiary restrictions, she refused to adhere to them and this caused undue prejudice. 2RP 43.

The court found her disobedience intentional. CP 23-24. The witness had a personal animosity toward Mr. Livnat underlying her testimony that made it impossible to enforce the dictates of a fair trial. 3RP 48.

A witness's inability to comply with the court's orders prohibiting the jury from hearing unduly prejudicial accusations constitutes arbitrary action that undermines the fairness of the trial. It upends the prosecution's duty to provide the accused person with a fair trial.

On appeal, the prosecution contends it was the court's job to control the witness, not the prosecution's role. App. Brief at 39. This contention is raised for the first time on appeal. The trial prosecutor did not blame the court for failing to control the State's witness. Instead, the prosecution agreed

the appropriate remedy was to strike the witness's testimony. 3RP 21; 4RP 7. While the court is a gatekeeper, it cannot control a witness who does not follow its ruling or negate any prejudicial effect of a witness's testimony premised on excluded evidence.

It is well-settled that once a witness has made prejudicial remarks, it may be impossible to undo the harm. *See Taylor*, 18 Wn. App. 2d at 581-83. For example, in *State v. Escalona*, 49 Wn. App. 251, 253, 742 P.2d 190 (1987), the complaining witness mentioned the defendant "has a record and had stabbed someone" in the past. The court promptly ordered the jury to disregard the statement and denied the defense request for a mistrial. *Id*.

This Court ruled that the "extremely serious" nature of information conveying the defendant had committed a similar crime in the past undermined the fairness of the trial, even if the jury was told to disregard it. *Id*. at 255. In the context of an otherwise weak case, it likely affected the jury. *Id*. at 255-56.

No one blamed the parties or court for not better controlling the witness.

Here, Ms. Fernandez did not answer a number of the questions put to her with yes or no answers or give direct answers when instructed to do so, and would talk when no question was put to her. 2RP 24-25, 29, 35-36, 37, 39-30. While she was not a professional witness, she was instructed before and during the trial to answer only the questions put to her and to omit mention of behavior outside of the charged crime. 2RP 24-25, 29, 35-37, 39-40, 43; 3RP 21. The court deemed her refusal to do so intentional. CP 23-24.

CrR 8.3(b) does not require purposeful misconduct by the prosecution. It includes errors that prejudice the fairness of the trial. Here, the defense and court agreed the prosecution had tried to tell Ms. Fernandez to adhere to the court's rulings. But the prosecution did not get a central witness to refrain from injecting unduly prejudicial, excluded information into the trial. The court appropriately ruled the error violated Mr. Livnat's

right to a fair trial and could not be remedied other than by dismissal.

d. The court properly found Mr. Livnat was prejudiced in his right to a fair trial.

A "violation of a pretrial order is a serious irregularity." *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). It is also "extremely serious" to present the jury with information about the accused person's prior misconduct, even when the court strikes this evidence and tells the jury to disregard it, as occurred in *Escalona*, 49 Wn. App. at 255. This evidence is "inherently prejudicial." *Id*. at 256.

Actual prejudice justifying dismissal under CrR 8.3(b) includes more than the impact of the error on the fairness of the trial itself. It arises when an accused person must choose between his basic rights such as a speedy trial and effective assistance of counsel. *Brooks*, 149 Wn. App. at 387.

In *Brooks*, "delayed and missing discovery prevented defense counsel from preparing for trial in a timely fashion."

Id. at 391. The trial court ruled that dismissal was an appropriate sanction for the belated discovery and this Court affirmed. *Id*.; *see also Price*, 94 Wn.2d at 814 (when State "inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage" it may "impermissibly prejudice[ ]" the defendant's right to a speedy trial or his right to be represented by prepared counsel.).

A mistrial does not necessarily remedy misconduct or arbitrary action. *Martinez*, 121 Wn. App. at 35–36. If the most severe consequence that follows from arbitrary action or misconduct is that the prosecution may have to try the case twice, "it will hardly be seriously deterred from such conduct in the future." *Id*.

Dismissal may be justified under CrR 8.3(b) based on the error's ramifications on the accused person. In *Martinez*, the prosecution failed to disclose relevant information before trial. The actual prejudice justifying dismissal included the time the

defendant spent in jail awaiting trial and the fact he had "exhausted his financial resources defending himself in a trial 'tainted from the opening statement.'" 121 Wn. App. at 36.

Here, the court concluded Ms. Fernandez's testimony unfairly prejudiced Mr. Livnat's right to a fair trial and striking her testimony would not remove the taint. CP 24. It had no reason to believe the very same error would not recur if the case was retried. There would be little reason for the witness to follow the court's instructions in a future case if the witness knew that the worst case scenario was that the prosecution may have to try the case again. *Martinez*, 121 Wn. App. at 35–36.

The court further ruled dismissal was appropriate because a mistrial did not cure the prejudice to Mr. Livnat from the consequences of the case. The trial was not only a considerable expense to Mr. Livnat, as occurred in *Martinez*, but a new trial also detrimentally delayed his ability to communicate with his son or resolve a pending family court case. 4RP 3-4. The right to parent is a fundamental

constitutional right and the interference with that right must be sensitively imposed and reasonably necessary to accomplish the essential needs of the State. *In re Rainey*, 168 Wn.2d 367, 377, 229 P.3d 367 (2010).

The court acknowledged the extraordinary prejudice resulting from further delay in the family law matter caused by this case. 4RP 3-4. Based on the unique family dynamics at issue, where further trial delay benefitted Ms. Fernandez's interest in denying Mr. Livnat contact with his son, the court was not required to turn a blind eye to the underlying circumstances of the case and the fundamental rights impacted.

The court's finding of prejudice was not based on pure speculation, as the prosecution incorrectly asserts on appeal. The court heard the testimony, saw the witnesses, and observed the jurors. The court ruled a curative instruction cannot "erase from any juror's mind" Ms. Fernandez's testimony and behavior. 3RP 25. The court ruled, "The prejudice just can't be

cured after something that demonstrative happening in a courtroom setting." *Id*.

The trial court observed the prosecution's case before it decided the dismissal was justified. The trial court understood the overall weakness of the prosecution's case and the court could assess the material prejudice from uncharged misconduct.

Mr. Livnat's had an available and viable defense resting on permissible parental discipline, as a parent is permitted to use reasonable and moderate force for the purpose of correcting or restraining a child. RCW 9A.16.100; 1RP 21-29 (discussing admissibility of Shay's provoking conduct in context of defense involving reasonable parental discipline and lawful use of force). The improperly offered evidence of Mr. Livnat's propensity for wrongful attacks, acting out of anger, or improperly handling his son materially prejudiced Mr. Livnat's defense and thus affected the fairness of the trial.

The prosecution belittles the judge by claiming she simply relied on a 'gut feeling" that the jury could not disregard an incident if instructed to do so. But this Court trusts judges to make credibility assessments and to weigh the impact of prejudicial evidence on the jury. The court concluded the jurors would be affected by Ms. Fernandez's testimony and behavior in court, and would conclude Mr. Livnat has a propensity for committing the type of crime charged.

The court considered lesser remedies and clearly set out why it believed they were inadequate. Its reasons were sound and well-explained. Its ruling falls squarely within its discretion.

2. The prosecution agreed it was appropriate to strike Ms. Fernandez's testimony, inviting the court's decision and waiving an objection raised for the first time on appeal.

On appeal, the prosecution separately argues that a court lacks authority to strike a witness's testimony unless the witness refuses to answer questions. App. Brief at 55-56. It

asserts that because Ms. Fernandez answered questions, even if done in a non-responsive way or if it involved inserting inadmissible evidence, the court had no authority to strike her testimony in its entirety. App. Brief at 58.

Yet at trial, the prosecution encouraged the court to strike her testimony in its entirety. 3RP 21; 4RP 7. It told this court striking her testimony would be a clear remedy for the witness's failure to adhere to the court's orders.

Although the prosecutor initially argued that Ms. Fernandez's testimony was not unduly prejudicial, it did not object when the court ruled that it would strike her testimony. 2RP 49. It promptly agreed to dismiss the witness so she would not return the next day. 2RP 50.

The prosecution told the court the remedy of striking the witness's testimony "was appropriate in that it struck all of testimony of Ms. Fernandez." 4RP 7. By striking of all her testimony, the jury would clearly understand it "cannot use parts of what she said." *Id*. It assured the court that any

prejudice from Ms. Fernandez's testimony "has been cured by the defendant's motion to strike testimony of Ms. Fernandez." 3RP 21.

The court did not err by ruling Ms. Fernandez's testimony was unduly prejudicial. It initially offered the remedy of striking her testimony but then decided that striking her testimony was inadequate, because the jury could not erase the information and demeanor of this witness in a way that would permit Mr. Livnat to have a fair trial. The court's rule was based on its reasonable assessment of the evidence and its impact in the courtroom.

3. Dismissal is also required under double jeopardy rules.

The court terminated the trial and dismissed the case after jeopardy attached. It did not grant a mistrial and Mr. Livnat expressly opposed the court ordered a mistrial. 3RP 4, 15-16. If, as the prosecution contends, the court did not have a

valid basis for terminating the trial, double jeopardy principles prohibit another prosecution of this case.

Under the constitutional prohibition on double jeopardy, an accused person "is protected from a second prosecution for the same offense not only after acquittal or conviction, but also after his trial is terminated by a mistrial being declared at any point after the first witness has answered the first question." *State v. Jones*, 97 Wn.2d 159, 162, 641 P.2d 708 (1982); U.S. Const. amend. V; Const. art. I, § 9. This prohibition against a retrial applies when a mistrial is granted without the defendant's consent and after jeopardy has attached, unless the mistrial was justified by a "manifest necessity." *State v. Sheets*, 128 Wn. App. 149, 151-52, 115 P.3d 1004 (2005).

Unnecessarily ordering a new trial prejudices the accused. *Jones*, 97 Wn.2d at 162. A second trial "prolongs the ordeal of the accused by adding to the financial and emotional burden he must should while his guilt or innocence is determined." *Id*. It may also "increase the chances of an

innocent defendant's being convicted." *Id*., citing *Arizona v. Washington*, 434 U.S. 497, 503-04, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (explaining second trial "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted").

Forcing a person to choose "between continuing under circumstances of serious prejudice or agreeing to a mistrial is not a choice between genuine alternatives." *State v. Rich*, 63 Wn. App. 743, 748, 821 P.2d 1269 (1992). In *Rich*, the defendant had to either accept a mistrial or consent to the prosecution reopening its case. *Id*. at 746, 748. He did not expressly choose either and instead argued the court should dismiss the case for insufficient evidence. *Id*. at 748. The trial court declared a mistrial. *Id*. This Court held he had not consented to the mistrial under these circumstances and double jeopardy barred retrial. *Id*.

In *Sheets*, a prosecution witness testified about the victim's flirtatious behavior toward others in a rape case. 128 Wn. App. at 153, 156. The State sought a mistrial on the grounds this testimony violated the rape shield law. *Id*. at 157. The court granted the mistrial "because a limiting instruction would not work" to cure the prejudice. *Id*.

On appeal, this Court ruled there were not "extraordinary and striking circumstances required" for a mistrial. *Id*. at 158. The witness's testimony was admissible in the first instance and not the kind of testimony that would irreparably prejudice the jury in any event. *Id*. Yet because the court prematurely ended the trial after jeopardy attached and without sufficient cause, double jeopardy rules barred a retrial when the defense did not request the mistrial. *Id*.

Similarly to *Rich* and *Sheets*, Mr. Livnat did not request a mistrial. Defense counsel explained that "a mistrial really prejudices my client even more" due to the overlapping family law case that had been stayed for a year and a half. 3RP 15-16.

The trial had been a "great expense" to Mr. Livnat, who had not been permitted to see his older child at all, and his younger child only in supervised visits, due to the prosecution. 3RP 4. He asked the court to rule the intentional and prejudicial behavior of the witness requires dismissal. 3RP 16.

If the court erred by ruling the jurors could not fairly evaluate the case as the prosecution contends, and as occurred in *Sheets*, court did not have grounds to terminate the case before a verdict was reached. 128 Wn. App. at 158. The defense purposefully did not seek a mistrial and was opposed to the court ordering one. 3RP 4, 15; *see Rich*, 63 Wn. App. at 748. The prosecution claims there was no manifest necessity for a mistrial. If the prosecution is correct that there was reason to prematurely end the case, jeopardy has attached and retrial is barred by double jeopardy.

4. If the case is remanded for further proceedings, there is no valid basis to remove the judge from the case.

A court's role is to evaluate evidence, resolve legal questions, and make factual determinations. The prosecution baselessly asks this Court to assign a new judge on remand because it disagrees with the court's findings.

Reassignment of the judge who presided in a case is not a generally available remedy. *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014). In most circumstances, a party seeking a new judge must file a motion for recusal in the trial court. *Id*. at 386. The recusal rule permits the challenged judge to "evaluate the stated ground for recusal in the first instance" and allows parties to develop a record about whether the judge's impartiality might reasonably be questioned. *Id*.

"[L]egal errors alone do not warrant reassignment." *Id*. at 388. Erroneous rulings are "grounds for appeal, not for recusal." *Id*. (quoting *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)).

When a case is remanded after an appeal, the trial court "is bound on remand" by the appellate court decision. *Id*. A judge is presumed to follow the law, even where a judge has expressed a strong opinion about the matter appealed. *Id*. at 387.

Here, there is no reason to conclude the judge cannot be fair. The judge never said she planned to grant a motion to acquit at halftime, as the prosecution erroneously asserts on appeal. App. Brief at 62-63. The only time the court mentioned a potential halftime ruling was after the court issued its oral ruling dismissing the case under CrR 8.3(b). 3RP 24-25. The prosecution asked the court to clarify whether there was sufficient prejudice to grant a mistrial, which the court had not specifically addressed earlier in the day when the notion of a possible mistrial arose. 3RP 26. The court responded, "Frankly, I was waiting for that halftime motion. I didn't think I needed to address it at that time. I could have, but I didn't." 3RP 26. The prosecution agreed. 3RP 27.

During this exchange, the court did not address the weight of the testimony or make findings about the sufficiency of the evidence. The court did not indicate it had decided to dismiss any charges. It did not suggest it prejudged the evidence or was unable to impartially preside over the case.

The court did not receive information that it was prohibited from hearing. There is no basis in the record to conclude the court cannot adhere to this Court's ruling should the case be remanded for further proceedings. The prosecution's effort to move the case to a judge who might be more favorable to its case should be rejected.

E. CONCLUSION.

This Court should affirm the trial court's ruling dismissing the case under CrR 8.3(b), which is based on the court's sound assessment of the case and reasonable application of the law. Alternatively, a retrial of the same charges violates the prohibition on double jeopardy.

Counsel certifies this brief complies with RAP 18.17 and contains approximately 8729 words.

DATED this 22nd day of August 2022.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

YANIV LIVNAT, Respondent, v. STATE OF WASHINGTON, Appellant.	)))))))))	NO. 56379-7-II

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